# In the Supreme Court

## of the United States

OCTOBER TERM 1966

No. 730 21

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,

*Appellants,*

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased,

*Appellees.*

*Appeal from the Supreme Court of the State of Oregon*

## APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

PETER A. SCHWABE, SR.,
PETER A. SCHWABE, Jr.,
721 Pacific Building, Portland, Oregon 97204,
*Attorneys for Appellants.*

ROBERT Y. THORNTON, Attorney General of Oregon,
WAYNE M. THOMPSON, Assistant Attorney General,
Supreme Court Building, Salem, Oregon 97310,
*Attorneys for Appellees.*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-66

## INDEX

## CITATIONS

Page

### CASES



### STATUTES

CITATIONS (Cont.)

# In the Supreme Court

## of the United States

OCTOBER TERM 1966

**No. 730**

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,

*Appellants,*

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased,

*Appellees.*

*Appeal from the Supreme Court of the State of Oregon*

**APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM**

Appellee, State Land Board of Oregon, bases its motion to dismiss or affirm on the claims 1) that one of the federal questions sought to be reviewed was neither timely nor properly raised nor expressly passed upon by the courts of the State of Oregon, and 2) that this appeal does not present a substantial federal question.

## REPLY TO ARGUMENT ON POINT ONE

In appellee's argument mention is made only of the due process and equal protection clauses of the Fourteenth Amendment, which ground for questioning the validity of ORS 111.070, it is contended, was not presented as an issue in the courts of the State of Oregon. However, appellee says nothing of the other ground on which the constitutionality of the Oregon statute was questioned, namely Article I, § 10, specifically mentioned in the Oregon Supreme Court's opinion, as was also Article VI [Vol. 82 Or. Adv. Sh. at 452, Jur. St. App. 19-20]. That the invalidity of ORS 111.070 was alleged in the pleadings and contended for from the very inception and at every stage of the litigation in the courts below is not denied and is amply demonstrated under "Federal Questions Raised and Passed Upon in Courts Below" beginning at page 10 of the Jurisdictional Statement.

It may be pointed out, furthermore, that if a state statute be held invalid because in violation of Article I, § 10, Article I, § 8, Article VI or any other provision of the Constitution, *it results therefrom* that property escheated under such a statute is being taken by the state without due process of law or compensation.

If, contrary to appellants' firm conviction that their procedure before this Court is by appeal, they should be found mistaken, then appellants respectfully ask that, pursuant to 28 U.S.C. § 2103, the papers

whereon this appeal was taken be regarded and acted upon as a petition for writ of certiorari and as if duly presented to this Court at the time the appeal was taken. [*Hanson* v. *Deckla*, 357 U.S. 235 (1958)].

## REPLY TO ARGUMENT ON POINT TWO

As was to be anticipated, appellee argues that *Clark* v. *Allen*, 331 U.S. 503 (1947) should be determinative of this case and says that appellants "can point to no such announced change of policy or law," the word "such" referring to a "change in federal policy" [Motion, p. 71].

Appellee overlooks the firmly settled rule, redeclared by this Court in *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 415 and quoted at page 13 of the Jurisdictional Statement that:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

In succeeding pages of their Jusisdictional Statement appellants point out the very material differences between the 1941 California reciprocity statute involved in *Clark* and the much harsher, far more confiscatory 1951 Oregon reciprocity statute here involved, the great volume of litigation on inheritance rights of aliens which has ground its way through the courts of numerous states during the two decades since *Clark* v. *Allen*, the harsh, intemperate, derisive,

plementing their views of the beneficiary's government will even more clearly have such an effect."

p. 333:

"When states legislate on aliens' rights to legacies, they are entering an area usually thought to belong exclusively to the federal government. The executive department of the federal government is charged with the conduct of foreign affairs, free from state interference. [fn. 28 citing *U. S.* v. *Pink*, 315 U.S. 203, 233 (1941) and *U. S.* v. *Belmont*, 301 U.S. 324, 331 (1937)]. The states do, however, retain exclusive control over matters of decedents' estates [fn. 29 citing *Blythe* v. *Hinkley*, 180 U.S. 333 (1901) for the proposition that 'a state may grant inheritance rights to all aliens'; conversely citing *Terrace* v. *Thompson*, 263 U.S. 197 (1923) for the proposition that a state may 'deny inheritance rights to all aliens.'] When these two areas of the law overlap, as they surely must where alien beneficiaries are concerned, conflict is likely to result."

This is one of appellants' major points in this appeal —that invasion by the states of the exclusive federal power to regulate the foreign relations of the United States occurs the moment any state seeks to lay down its own conditions and requirements, by statute, under which non-resident aliens may inherit or be barred from inheriting in that state. Continuing the above quotation:

"State courts applying a reciprocity rule must

> sit in judgment on a foreign government, and decide whether it treats American citizens in a prescribed manner."

Thus the "Iron Curtain Rule" was born and generally adopted by the eastern states with their relatively mild withholding statutes [such as § 269a of the New York Surrogate Courts Act] as well as the western states with their confiscatory statutes [such as Oregon's § 111.070 which is directly involved here]. Continuing:

p. 334:

> "If the alien loses, the state court may have ruled that the foreign representatives have incorrectly stated their own inheritance law."
>
> [exactly what the Oregon Supreme Court did in *State Land Board of Oregon* v. *Pekarek*, 234 Or. 74, 378 P2d 374 (1963). See quotation from 234 Or. 83 on pp. 15-16 of appellants' Jurisdictional Statement herein, and other examples cited on p. 16 thereof].
>
> Our State Department, maintaining friendly relations with the alien's government, may well be embarrassed by the 'unfriendly' action of the state court [fn. 32 quoting the United States Attorney General's statement on p. 75 of his petitioner's brief in *Clark* v. *Allen*, 331 U.S. 503 (1947) that the California reciprocity statute—then much milder than Oregon's present § 111.070—'will be a recurrent source of diplomatic friction']. The latter may appear to the alien's government to be the action of the entire nation. In any event it is likely to engender resentment.

American interests abroad may thus be materially affected by a retaliatory state statute purporting to regulate inheritance only."

Certainly the "Iron Curtain Rule" and its denial of their inheritance rights to beneficiaries in most if not all of the eastern European countries is in direct conflict with the policy of the Federal Government, as reiterated most recently in the Chief Executive's statement of October 7, 1966, heretofore mentioned, to foster closer and more friendly relations with the nations of eastern Europe. Concluding quotation from the above treatise: [p. 336]

p. 336:

"If the federal government has adopted an official attitude of friendliness toward a foreign nation, then a state statute which serves to create any sort of ill will may properly be considered an unwarranted incursion by that state into the foreign affairs field." [fn. 48 quoting as follows from *U. S.* v. *Curtiss-Wright Corp.* 299 U.S. 304, 319 (1936):

'Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.'"

With what great force those words apply to the case

at bar! Truly prophetic was this treatise, published in 1951, when viewed in the light of world events during the last fifteen years and particularly the posture of the Federal Government towards the foreign nations directly affected by the "Iron Curtain Rule." As the treatise concludes, the decision to cut off the flow of inherited property to alien beneficiaries "should, in other words, be made by the federal government."

At page 21 of the Jurisdictional Statement under "Questions of Great Public Importance Presented" appellants state that "the holding of this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) seems to point the way." Reference is respectfully made to Professor Henkin's analysis of and comments on that decision entitled "The Foreign Affairs Power in the Federal Courts: Sabbatino" in 64 Columbia Law Review 805 (1964) in which he points out that the Act of State doctrine has become part of the body of "federal common law," involving delicate issues of foreign policy and foreign relations on which the individual states may not place their own judicial interpretations. Thus in *Sabbatino* the state court of New York could not impose its exception on the Act of State doctrine by holding that it was not applicable where the court deemed the act of the sovereign foreign state to be in violation of international law.

By the same token, while it may, for the purpose of this argument, be conceded that a state may bar all nonresident aliens from inheriting, it becomes an invasion of the exclusive federal province, of the "fed-

eral common law," for a state to lay down terms and conditions which a foreign nation must meet in order that its nationals may inherit in that state, and to confiscate its nationals' inheritance if the state's terms and conditions are not met. It is difficult to conceive of a more sensitive area of foreign relations.

At page 807 Professor Henkin quotes as follows from Chief Justice Fuller's opinion in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) at 252:

> "Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves,"

that is by the executive branch at the diplomatic level. Exactly so in the field of reciprocal inheritance rights, the courts of the United States, and particularly the courts of the individual states, may not "sit in judgment" on the constitutions, the laws, the foreign exchange regulations and other "acts" of sovereign foreign states, condemn them as not conforming to American, or the individual state's, or the individual judge's concepts or requirements, and deny the nationals of such sovereign states their rights of inheritance, even to the point of confiscation, which the law abhors. If terms and conditions for aliens to inherit in the United States are to be laid down and imposed, they must be uniform throughout the coun-

try and must and can be imposed only by the federal government. If it were not so, the end result of state legislation in this field could conceivably be fifty different sets of terms and conditions, and fifty different adjudications defining what aliens may inherit and what aliens are barred from inheriting in any particular state of this country. Foreign nations may not deal or negotiate with the individual states in this or any other field. In the absence of promptest action on the federal level, utter chaos will most certainly result.

## CONCLUSION

Appellants submit that there is no merit to either of the objections made in appellee's motion to dismiss or affirm. Clearly the questions and issues here presented were in fact raised, considered and passed upon in the courts below. There are indeed presented here federal questions of the greatest substance, of the greatest and gravest public importance and urgency.

Appellants reiterate their prayer that jurisdiction by this Court be noted and this case set for plenary consideration.

Respectfully submitted,

PETER A. SCHWABE, SR.
PETER A. SCHWABE, JR.
Attorneys for Appellants.

# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 730

IN THE MATTER OF THE ESTATE OF PAULINE SCHRADER, DECEASED, OSWALD ZSCHERNIG, ET AL., APPELLANTS

*v.*

WILLIAM J. MILLER, ET AL.

*ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON*

## MEMORANDUM FOR THE UNITED STATES

By order of the Court dated January 9, 1967, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons stated below, we do not believe that it raises federal questions of sufficient significance to necessitate review by this Court.

1. Pauline Schrader, a resident of Oregon, died intestate on September 30, 1962. Her sole heirs were appellants, residents of the Soviet Zone of Germany. Acting pursuant to Section 111.070 of the Oregon Revised Statutes (J.S. 6–7), the State of Oregon filed a petition in the probate court for the escheat of the decedent's estate, which comprised both real and per-



255-324—67

sonal property located in Oregon. Appellants in turn filed a petition to determine their heirship and obtain distribution of the estate.

The State's claim of escheat was based upon O.R.S. 111.070, which conditions a non-resident alien's right to inherit property within Oregon upon (a) the existence of a reciprocal right of American citizens to inherit upon the same terms and conditions as citizens of the country of which the alien heir is an inhabitant or citizen, (b) the right of American citizens to receive payments within the United States from the estates of decedents dying within such foreign country, and (c) proof that the alien heirs of the American decedent will receive the benefit, use or control of their inheritance without confiscation. The statute places the burden on the alien heir to prove that all of the conditions are met. If these conditions are not satisfied, and there are no other heirs, the property is to escheat to the State.

The probate court, holding that "the evidence before the court did not establish the existence of reciprocity of inheritance rights as required by O.R.S. 111.070" with respect to the Soviet Zone of Germany at the date of the decedent's death, ordered that all the property of the estate escheat to the State of Oregon (J.S. App. 25–27). The Supreme Court of Oregon (J.S. App. 1–24) modified the decree of escheat so as to apply only to the decedent's personal property. It ruled that the right of inhabitants of the Soviet Zone of Germany to inherit real property in the United States was guaranteed by Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights

with Germany (App. *infra*, p. 9)[1] and hence the Oregon statute could not govern devolution of such property. *Kolovrat* v. *Oregon*, 366 U.S. 187. Article IV of that treaty survived World War II, the court concluded, and was not affected by the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany,[2] which only applies to West Germany. As to the personal property, however, the Supreme Court of Oregon held on the authority of *Clark* v. *Allen*, 331 U.S. 503, that Article IV of the 1923 Treaty was inapplicable and that, therefore, the probate court had correctly applied the provisions of O.R.S. 111.070. Further relying upon *Clark* v. *Allen*, the court determined that the Oregon statute was constitutional.

2. In *Clark* v. *Allen*, this Court was called upon to determine whether a California statute—in relevant part identical to the Oregon statute involved here[3]—

---

[1] December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925), amended June 3, 1935, 49 Stat. 3258, T.S. No. 897. Hereafter referred to as the 1923 Treaty.

[2] 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956), hereafter referred to as the 1954 Treaty.

[3] For purposes of this litigation the California statute in *Clark* v. *Allen* cannot be distinguished from the Oregon statute. Appellants point out that the Oregon statute is in one respect more stringent than the California statute in that the California statute did not contain a provision similar to Section 1(c) of O.R.S. 111.070, which requires foreign heirs to prove that they will "receive the benefit, use or control" of their inheritance (J.S. 14). However, Section 1(c) was not critical to the result in the Oregon courts. The heirs also failed to meet the necessary criteria of Section 1 (a) and (b), standards also found in the California statute. Indeed, as the court below noted, they did not even contend that the requirements

could be invoked to bar the inheritance by German heirs of the personal property of an American citizen residing in California. Answering the question in the affirmative, the Court held (1) that the 1923 Treaty with Germany did not "cover personalty located in this country and which an American citizen undertakes to leave to German nationals" (331 U.S. at 516) and (2) that the application of the California statute to such property was not an unconstitutional extension of State power into the field of foreign affairs.

In the present litigation, appellants' main argument in the court below was that their right of inheritance of both real and personal property was guaranteed by the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, which, they contended, applied to the Soviet Zone of Germany. Assuming that the 1954 Treaty did not apply to the Soviet Zone, appellants contended, in the alternative, that this Court's construction of Article IV of the 1923 Treaty in *Clark* v. *Allen* (as being applicable only to real property) was incorrect,[4] and additionally that the portion of *Clark* v. *Allen* upholding the constitutionality of the State reciprocal inheritance law should be re-examined. In this Court, however, appellants apparently do not challenge the holdings of the Oregon

---

of Section 1(b) could be met (J.S. App. 16). Thus, if, as this Court held in *Clark* v. *Allen*, the first two standards were permissible, there would be no occasion to consider the permissibility of the third.

[4] See Petition for Rehearing and Brief, p. 17.

court on the questions of treaty interpretation;[5] they now raise only the issue of the constitutionality of the Oregon reciprocity statute.

3. Appellants contend that "changed conditions" warrant reconsideration of the constitutional issue decided in *Clark* v. *Allen* (J.S. 13). Specifically, they allege that the Oregon statute, and others like it, have impermissibly interfered with the foreign relations and foreign policy of the United States and that their enforcement "must be a source of the deepest embarrassment to the State Department, and add gravely to its conduct of the relations with [involved] countries * * *" (J.S. 17). The Department of State has advised us, however, that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country. Indeed, while asserting that the criticism of foreign regimes implied or expressed in State-court decisions under the reciprocity laws are bound to excite adverse international reaction, appellants concede that "so far the reaction has not crystallized" (J.S. 20). Appellants' apprehension of a deterioration in international relations, unsubstantiated by experience, does not constitute the kind of "changed conditions" which might call for re-examination of *Clark* v. *Allen*.

Nor do we agree with appellants' broad constitutional theory that—regardless of its actual impact on

[5] The Department of State takes the position that the Oregon court correctly ruled that the 1954 Treaty does not apply to the Soviet Zone, that the 1923 Treaty is still effective, and that the latter is applicable to the Soviet Zone.

foreign affairs—the Oregon statute is an "invasion of the exclusive federal power to regulate * * * foreign relations" (J.S. 13). The federal power over foreign relations, like the commerce power, "embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature * * *." *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, 319. For much the same reasons that not all State regulation of transactions in interstate commerce is precluded by the federal commerce power,* not all State enactments touching on foreign affairs are precluded by the "brooding omnipresence" of federal authority in that area. Unquestionably, State regulations must yield when they collide with the exercise of the federal authority. See *Hines* v. *Davidowitz*, 312 U.S. 52. But it is not contended here that the Oregon act is in conflict with any federal law or policy bearing upon the subject matter of this litigation. Moreover, the State's obvious interest in regulating the devolution of property within its borders is not lightly to be subordinated. Cf. *United States* v. *Burnison*, 339 U.S. 87 (upholding a State statute prohibiting testamentary bequests to the United States). The mere fact that a State law may have "some incidental or indirect effect in foreign countries" is not a sufficient basis for declaring it invalid. *Clark* v. *Allen*, 331 U.S. at 517.

4. As noted above, we do not believe that in the

---

* See *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424; *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440.

present context the constitutional issue raised by appellants is a substantial one. We point out, however, that should the Court undertake to note probable jurisdiction, it would become appropriate to re-examine the issue of treaty interpretation which lies at the threshhold of the constitutional issue which appellants tender. Thus, if the Court were to conclude, contrary to its earlier reading of the 1923 Treaty in *Clark* v. *Allen,* that the treaty *does* apply to the devolution of personal property left by an American national in this country,[7] this case would be at an end.[8]

So saying, we do not imply that there are independent reasons for re-examining at this time the issue of treaty interpretation decided in *Clark.* The 1923 Treaty, having been superseded so far as West Germany is concerned, applies only to the Soviet Zone—an area as to which the current state of our relations presents a unique situation of uncertain duration. Moreover, although the relevant language in the 1923 Treaty appears in some 34 other treaties, this Court's liberal interpretation of the treaty involved in *Kolovrat* v. *Oregon,* 366 U.S. 187, would

[7] If the decedent had died a national of Germany, it would be clear that the 1923 Treaty does apply. *Clark* v. *Allen,* 331 U.S. at 516. The record does not reveal Mrs. Schrader's nationality, but the Oregon court assumed that she was American (J.S. App. 19, n. 5). In so doing, the court relied on this Court's similar assumption in *Clark.* But there the Court simply held that the government was not entitled to a judgment on the pleadings in the absence of an allegation as to the decedent's nationality (331 U.S. at 516).

[8] The State Department's view of the 1923 Treaty was not accepted by the Court in *Clark* v. *Allen.* See, in this connection, Meekison, *Treaty Provisions for the Inheritance of Personal Property,* 44 Am. J. Int'l L. 313 (1950).